COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP43-CR **Cir. Ct. No. 2012CF2759**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DESMOND MAURICE CORNELIUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Desmond Maurice Cornelius appeals from a judgment of conviction for two counts of physical abuse of a child (intentionally

causing bodily harm), and one count of possession of THC as a repeater, contrary to WIS. STAT. §§ 948.03(2)(b), 961.41(3g)(e) and 939.62(1)(a) (2011-12).[1] Cornelius argues that the trial court should have granted his pretrial motion to suppress evidence related to the THC (marijuana) charge. We affirm.

BACKGROUND

¶2 Law enforcement officers investigating the death of a two-year-old child went to a residence where they believed the girl's mother, Tammy Silva, and her boyfriend, Cornelius, were staying with Cornelius's mother, Darlene DeBack. The officers spoke with DeBack, who was outside the residence. She said she did not have her key to the residence with her, but she and the officers knocked on the back door, the front door, and then the back door again.

¶3 The second time they were at the back door, at least two officers smelled burning marijuana and one of them looked through the partially opened window next to the back door and saw a cigar wrapping and tobacco in a garbage can and a partially smoked "blunt" in an ashtray.[2] That officer testified that he was concerned the marijuana could be destroyed by flushing it down the toilet or burning it, so he decided to enter the residence through the window, without waiting to secure a search warrant.

¶4 The officer said that after entering the residence, he saw Cornelius, Silva, and Cornelius's brother exit a bedroom, from which the smell of marijuana

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] A blunt is "a cigar used to smoke marijuana by hollowing out the center and inserting the drug." *See* ***State v. Hughes***, 2000 WI 24, ¶8, 233 Wis. 2d 280, 607 N.W.2d 621.

was emanating. Another officer testified that when he went into the bedroom, he saw a bag of marijuana and a firearm "in plain view." After restraining the three individuals, the officers applied for and obtained a search warrant. They seized the bag of marijuana, marijuana cigarettes, and a firearm from the residence.

¶5 Cornelius was charged with two crimes related to the evidence seized at DeBack's residence: possession of a firearm by a felon and possession of THC, both as a repeater. Cornelius was also charged with four counts of physical abuse of a child, as a repeater.

¶6 Cornelius filed a motion to suppress the evidence of the firearm and the marijuana.[3] The trial court heard testimony from four law enforcement officers, DeBack, and Cornelius. Cornelius argued that the law enforcement officers lacked probable cause to enter the residence and that there were no exigent circumstances that justified the warrantless entry. The trial court denied the motion after finding that the officers' testimony was more credible.[4] The trial court concluded that the smell of marijuana and the marijuana observed in the ashtray gave the officers probable cause to believe a crime had been committed, and that the exigent circumstances of "the potential of the destruction of that evidence" justified the warrantless entry.

¶7 The case proceeded to trial. After two days of trial testimony, Cornelius entered a plea agreement with the State, pursuant to which he pled no contest to one count of possession of THC as a repeater, and two counts of

[3] The motion to suppress did not involve evidence concerning the abuse of the child.

[4] The trial court announced its ruling in an oral decision and, several days later, provided additional explanation of its ruling during a scheduling conference.

physical abuse of a child (intentionally causing bodily harm), without the repeater enhancer. The other physical abuse counts were dismissed and read in and the firearm possession charge was "dismissed outright." The State agreed to recommend five years of initial confinement and leave the extended supervision to the discretion of the trial court.

¶8 The trial court imposed three consecutive sentences. It sentenced Cornelius to: three years of initial confinement and three years of extended supervision on one count of physical abuse; two years of initial confinement and three years of extended supervision on the second count of physical abuse; and one year of initial confinement and one year of extended supervision on the THC count. This appeal follows.

DISCUSSION

¶9 Cornelius presents two arguments. First, he argues that the law enforcement officers lacked probable cause to enter the "residence without a search warrant because there was no odor of marijuana present." (Bolding and some uppercasing omitted.) Second, he argues that "exigent circumstances did not exist when law enforcement officers entered … without a search warrant." (Bolding and some uppercasing omitted.) We consider each issue in turn.

I. Legal standards.

¶10 A warrantless entry into a home is "presumptively prohibited" under the Fourth Amendment to the United States Constitution as well as article 1, section 11 of the Wisconsin Constitution. ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. An exception to the warrant requirement arises

"where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." ***Id.***

¶11 "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Id.***, ¶21 (quoting ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)).

¶12 As for exigent circumstances, Wisconsin courts have recognized four circumstances which, when measured against the time required to procure a warrant, constitute exigent circumstances that justify a warrantless entry: "(1) an arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee." ***Id.***, ¶25 (citation omitted). "Whether exigent circumstances exist turns on considerations of reasonableness, and [courts] apply an objective test when making this determination." ***State v. Lee***, 2009 WI App 96, ¶9, 320 Wis. 2d 536, 771 N.W.2d 373. ***Lee*** explained: "The test is whether a police officer under the circumstances known to the officer at the time of entry reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." ***Id.*** (citations, brackets, and two sets of quotation marks omitted).

¶13 On appeal, "[o]ur review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463. "When presented with a question of constitutional fact, this court engages in a two-step inquiry. First, we review the [trial] court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently

apply constitutional principles to those facts." ***Id.*** (citations omitted). When we evaluate the trial court's findings of fact, we defer to its credibility assessments "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999).

II. Probable cause.

¶14 Cornelius asserts, contrary to the trial court's findings, that "it is unlikely that law enforcement officers smelled burning marijuana." He suggests that it is "suspicious" that the officers did not smell the marijuana at the back door the first time they knocked, but claimed to smell it the second time. He also points to "several inconsistencies between the law enforcement officers' testimony," such as one officer's testimony that the officers tried to enter the back door only once and another officer's testimony that his property inventory report may have misstated where one blunt was found. Cornelius concludes: "In light of the officers' conflicting testimony, the mislabeled property inventory, and the highly improbable allegation that Cornelius and Silva would begin smoking marijuana while the officers were attempting to enter, this Court should find that law enforcement officers did not have probable cause to enter the … [r]esidence."

¶15 In response, the State argues that the inconsistences can be explained and, in any event, the "alleged inconsistencies" do not affect the trial court's credibility and factual findings. We agree with the State. The trial court had the opportunity to evaluate each witness's credibility and explicitly stated that it had "found all of the Officers who testified more credible." The trial court specifically found that "there [wa]s a strong odor of marijuana that was coming from the house." The trial court further found that the police officers and DeBack

announced themselves, "trying to inform those other individuals in the house to come out of the house." The trial court also accepted the officer's testimony that he could see a blunt in an ashtray.

¶16 We defer to the trial court's credibility assessments. *See* ***Carnemolla***, 229 Wis. 2d at 661. Based on those credibility assessments, the trial court's findings are not clearly erroneous. Two officers testified that they smelled marijuana when they stood outside the back door, and one of them even testified that he had a conversation with DeBack about the marijuana he was smelling. The trial court's findings are supported by the officers' testimony, which the trial court was free to accept. Based on those findings, there was probable cause to believe that a crime had been committed.[5]

III. Exigent circumstances.

¶17 Cornelius argues that there were no exigent circumstances to justify the officers' warrantless entry into the residence.[6] As noted, the trial court found

[5] Cornelius's probable cause argument is based on his challenge to the trial court's factual findings. He does not argue that the officers lacked probable cause under the facts found by the trial court.

[6] Cornelius's argument that there were no exigent circumstances contradicts his post-hearing brief, in which Cornelius stated: "This matter turns on the credibility of the police officers that testified, specifically their testimony regarding the odor of marijuana coming from an open window beside the 2nd floor back door. *For if they are believed then there is both probable cause and exigent circumstances allowing them to enter*." (Emphasis added.) We agree with this assessment, and because the trial court found the officers' testimony credible, we conclude there was probable cause and exigent circumstances.

that the risk the marijuana would be destroyed constituted exigent circumstances.[7] *See* ***Hughes***, 233 Wis. 2d 280, ¶25. Cornelius challenges this finding, arguing:

> There is no indication in the record that Cornelius and Silva were ever aware of the law enforcement officers' presence or destroying evidence….
>
> …
>
> The mere possibility that Cornelius and Silva were destroying evidence, without additional supporting facts, is not enough evidence to create exigent circumstances to justify a warrantless search. Law enforcement officers must have supporting evidence to justify their belief that the suspects are aware of their presence and destroying evidence.

¶18 In support of his position, Cornelius cites ***State v. Guard***, 2012 WI App 8, 338 Wis. 2d 385, 808 N.W.2d 718, a case where law enforcement officers smelled marijuana outside a residence and entered without securing a warrant. *See* ***id.***, ¶4. ***Guard*** concluded that there were no exigent circumstances justifying that warrantless entry, explaining:

> There is no evidence in this record that Guard or his companions were aware of police presence when the officers opened the closed security door, when they explored the basement, when they checked the door to the first floor, or when they climbed the stairs. Both officers testified that Guard and his companions seemed unaware of police presence until the officers actually entered the upper unit and announced themselves. [One officer] testified that he heard loud voices and conversation while he and [another officer] were outside of the duplex, that he could continue to hear the "party ruckus" while proceeding up the stairs, and that Guard and his companions looked "pretty shocked" upon seeing the officers…. The record

[7] Because we conclude that the risk of destruction of evidence constituted exigent circumstances, we do not consider the other reason cited by the officers: the risk that the suspects would flee. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

> establishes by clear and convincing evidence that the occupants of the upper unit were unaware of the officers' presence, and that neither a reasonable perception of a threat to the officers' safety, nor a reasonable concern about the destruction of evidence, existed until the officers actually reached the top of the stairs leading to the upper unit and announced themselves.

Id., ¶34.

¶19 While the facts in ***Guard*** may not have supported a finding of exigent circumstances, we agree with the trial court that the facts in this case demonstrate exigent circumstances. As noted, "[t]he test is whether a police officer under the circumstances known to the officer at the time of entry reasonably believes that delay in procuring a warrant would … risk destruction of evidence." ***Lee***, 320 Wis. 2d 536, ¶9 (citations, brackets, and two sets of quotation marks omitted). Here, two officers testified that they were concerned that occupants of the residence would destroy the marijuana while they waited for a search warrant, which one officer testified could take four hours to obtain. Further, one officer testified that DeBack told him Cornelius and Silva were in the apartment, and several witnesses said that the officers and DeBack knocked on the back door, the front door, and the back door again. Finally, one officer said that he "yelled several times" at the back door, indicating that it was the "Milwaukee Police." In contrast to ***Guard***, there was no testimony in this case that the officers believed they had surprised the occupants or that the occupants were unaware of the officers until they announced themselves. *See* ***id.***, 338 Wis. 2d 385, ¶34.

¶20 Based on the officers' testimony that they knocked and yelled to announce their presence, it was reasonable for the officers to believe that the residents were aware of the officers and might take steps to destroy the marijuana evidence; this risk of destruction of evidence constituted exigent circumstances.

See ***Lee***, 320 Wis. 2d 536, ¶9. The existence of exigent circumstances, combined with probable cause, justified the warrantless entry of the home. *See* ***Hughes***, 233 Wis. 2d 280, ¶17. We reject Cornelius's challenge to the trial court's denial of the suppression motion and affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.